UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARKUS HEITKOETTER, an individual, and ROCKWELL TRADING SERVICES, LLC, a Texas limited liability company,

Plaintiff,

v.

KARL DOMM, an individual,

Defendant.

CASE NO. 22-cv-368-AWI-BAM

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

(Doc. No. 36)

Plaintiffs Markus Heitkoetter and Rockwell Trading Services, LLC ("Rockwell") bring several claims sounding in defamation against Defendant Karl Domm based on allegations that he published injurious falsehoods about them and their investment program through videos and comments on YouTube. Doc. Nos. 1 & 33. The operative pleading in this action is the Second Amended Complaint ("SAC"), which was filed on January 5, 2023. Doc. No. 33. Defendant Karl Domm has moved to dismiss certain claims in the SAC under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. No. 36. The motion has been fully briefed, Doc. Nos. 36, 37 & 41, and the Court has deemed the motion suitable for decision without oral argument pursuant to Local Rule 230(g). Doc. No. 38. For the reasons that follow, the Court will grant the motion in part and deny the motion in part.

BACKGROUND

Plaintiffs filed this action on March 29, 2022. No. 1. On November 7, 2022, the Court issued an order denying Defendant's special motion to strike the Complaint under California's anti-SLAPP law[1] but granting Defendant's motion to dismiss the Complaint, finding, in essence, that allegations as to supposedly defamatory statements were too general and interpretative. See Doc. No. 20 at 13:28-15:14.

Plaintiffs filed a First Amended Complaint ("FAC") on December 18, 2022. Doc. No. 23. Shortly thereafter, Plaintiffs brought an unopposed motion to amend the FAC. Doc. Nos. 26 & 30. That motion was granted on January 5, 2023 and Plaintiffs filed the SAC the same day. Doc. No. 32.[2] The SAC alleges false light, defamation by implication, defamation (libel and libel per se), intentional interference with prospective economic advantage and deceptive trade practices based on videos and comments that Defendant allegedly posted to YouTube regarding Plaintiffs and their investment program. See generally Doc. No. 33.

Defendant filed the instant motion to dismiss certain claims in the SAC, pursuant to Rule 12(b)(6),[3] on January 19, 2023. Doc. No. 36.

RULE 12(b)(6) FRAMEWORK

Under Rule 12(b)(6), a claim may be dismissed because of the plaintiff's "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. See Mollett v. Netflix, Inc., 795 F.3d 1062, 1065 (9th Cir. 2015). In reviewing a complaint under Rule 12(b)(6), all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Kwan v. SanMedica, Int'l, 854 F.3d 1088, 1096 (9th Cir. 2017). However, complaints that offer no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will

[1] SLAPP stands for "Strategic Lawsuit Against Public Participation." See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 831 (9th Cir.), amended, 897 F.3d 1224 (9th Cir. 2018).

[2] In light of the amendment, Defendant's motion to dismiss the FAC was denied as moot on January 13, 2023. Doc. No. 35.

[3] Unless otherwise indicated, "Rule," as used herein, refers to the Federal Rules of Civil Procedure.

not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Johnson v. Federal Home Loan Mortg. Corp., 793 F.3d 1005, 1008 (9th Cir. 2015). The Court is "not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013).

To avoid a Rule 12(b)(6) dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678; Mollett, 795 F.3d at 1065. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678; Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013). If a motion to dismiss is granted, "[the] district court should grant leave to amend even if no request to amend the pleading was made ...." Ebner v. Fresh, Inc., 838 F.3d 958, 962 (9th Cir. 2016). However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities. Garmon v. County of L.A., 828 F.3d 837, 842 (9th Cir. 2016).

DISCUSSION

Defendant seeks dismissal of Plaintiffs' false light claims, defamation claims as to certain statements, and Plaintiff's defamation by implication claim. See Doc. No. 36-1. The Court addresses each of these issues in turn.

A. False Light Claims

Defendant argues that Plaintiffs' false light claims should be dismissed with prejudice because they are duplicative of Plaintiffs' defamation claims. Doc. No. 36-1 at 3:21-4:22.

"False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." Price v. Operating Engineers Local Union No. 3, 195 Cal.App.4th 962, 970 (2011). The definition of libel (the species of defamation at issue

here) is "a false and unprivileged publication which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Barnes-Hind, Inc. v. Superior Court, 181 Cal.App.3d 377, 386 (1986) (citing Cal. Civ. Code § 45, quotations omitted).

The Court agrees with Defendant that a false light claim is duplicative of a defamation claim when it is based on the same facts as the defamation claim. Kapellas v. Kofman, 1 Cal.3d 20, 35 n.16 (1969) (finding that false light claim was "superfluous and should be dismissed" because it rested on the same facts as –and was "in substance equivalent to" – a libel claim); McClatchy Newspapers, Inc. v. Superior Court of Fresno County, 189 Cal.App.3d 961, 965 (1987) ("When an action for libel is alleged, a false-light claim based on the same facts ... is superfluous and should be dismissed.").

Plaintiffs fail to show that their false light claims are factually distinct from their defamation claims in any respect. In fact, the opposition brief only confirms that the false light claims and the defamation claims involve precisely the same facts. See Doc No. 37 at 8:27-9:16 (stating, *inter alia*, that the "entirety" of the allegedly false statements at issue in this case put Plaintiffs "in a false light"). Plaintiffs argue that they have a distinct false light claim based solely on a video (discussed further below) that was published during this litigation and that is addressed for the first time in the SAC. Id. at 9:8-16. That argument, however, ignores the fact that Plaintiffs also allege a defamation claim (specifically, a defamation by implication claim) based on that video, again creating a "superfluous" claim situation. Plaintiffs' false light claims will therefore be dismissed. See Brooks v. Physicians Clinical Lab'y, Inc., 2000 WL 336546, at *4 (E.D. Cal. Mar. 20, 2000) (dismissing false light claim as duplicative of libel claim where plaintiff failed to show that the two claims were "factually distinct"). Since this defect cannot be cured through repleading, dismissal will be with prejudice. See Garmon, 828 F.3d at 842.

B. Defamation Claims as to Certain Statements

Defendant argues that Plaintiffs' defamation claims—and claims derivative of Plaintiffs' defamation claims—fail to the extent they are based on statements that are not actionable as a matter of law. Doc. No. 36-1 at 4:23-14:14. Defendant identifies two statements that, he argues,

pertain to him and his work and, thus, are not "of or concerning Plaintiffs." Id. at 4:23-5:24. He identifies one statement that supposedly constitutes opinion. Id. at 6:1-10:5. And finally, he identifies five statements that, he claims, are substantially true. Id. at 10:6-14.

Plaintiffs argue that the two statements at issue in the "of or concerning Plaintiffs" category are contextual and only meant to show that Defendant led viewers to believe his statements regarding Plaintiffs were true. Doc. No. 37 at 9:19-26. Plaintiffs further argue that the other statements in question are neither opinion nor true. Id. at 10:1-21:2.

1. "Of and Concerning" Plaintiffs

The two statements attributed to Defendant that are supposedly not "of and concerning" Plaintiffs are as follows:

- "I am here only to share the truth and I am here to help people understand the true risks when they get involved with certain instructors. I am here to counteract that perfectly polished, perceived perception of YouTube Stock Instructors because it can be dangerous to your account."
- "I am only looking to share the truth and let others make their own decisions."

Doc. No. 36-1 at 5:10-16.

An otherwise defamatory statement is actionable only if it is "of and concerning" the plaintiff. Dickinson v. Cosby, 37 Cal.App.5th 1138, 1160 (2019). To satisfy the "of and concerning" requirement, the plaintiff must show, at a minimum, that the statement expressly mentions him or refers to him by reasonable implication. Id. (citing Blatty v. New York Times Co., 42 Cal.3d 1033, 1046 (1986)). The Court agrees with Defendant (as do Plaintiffs) that neither of the statements at issue here appear to be "of and concerning" the Plaintiffs. The Court, however, cannot find at this juncture that they do not bear on some other aspect of Plaintiffs' defamation claims, such as Defendant's mental state, see BAJI 7.04.1; whether other statements constituted opinion or an assertion of fact, see id. 7.00.1; or the effect of other statements on an average listener. Id. 7.01. This aspect of Defendant's motion will therefore be denied.

2. Statement of Opinion

The statement that supposedly constitutes opinion is as follows:

> I have proven that Directional Power X [Optimizer] has not worked over a one year period trading it myself and by following [Plaintiff's] attempt to trade it.

Doc. No. 37 at 10:5-7.

The Ninth Circuit applies a three-part "totality of the circumstances" test to determine whether a statement is protected opinion or an actionable assertion of fact, which involves examining (i) the statement "in its broad context" (including the "general tenor of the entire work"); (ii) the "specific context and content" of the statement, including "the extent of figurative or hyperbolic language" and the "reasonable expectations of the audience"; and (iii) whether the statement "is sufficiently factual to be susceptible of being proved true or false." Underwager v. Channel 9 Austl., 69 F.3d 361, 366 (9th Cir. 1995). California state courts take a similarly holistic approach to classifying statements as fact or opinion for purposes of defamation claims. See, e.g., Balzaga v. Fox News Network, LLC, 173 Cal.App.4th 1325, 1337-38 (2009).

Defendant argues as follows: The first factor (applying the Ninth Circuit test)—"broad context" and "general tenor"—favors a finding that the statement constitutes opinion because the statement was made in the context of a review that "states both good and bad aspects of [Defendant's] opinion of the software." Doc. No. 36-1 at 6:19-24. The second factor—"specific context"—favors a finding that the statement constitutes opinion because the statement was based on fully disclosed facts and involves "rhetorical hyperbole." Id. at 7:25-9:25. And the third factor—the extent to which a statement is susceptible to being proven true or false—favors a finding that the statement constitutes opinion because the "underlying and disclosed facts illustrate that the basis for the [statement] is true." Id. at 9:26-5.

The Court finds these arguments unconvincing. As to the first factor, it seems that a review based on more than a year of testing is at least as likely to contain statements of fact as it is to contain statements of opinion. As to the second factor, the Court sees no trace of hyperbole—or other rhetoric—in the statement. And as to the third factor, Defendant's assertion that the truth of the statement can be established by "underlying and disclosed facts" strikes the Court as an unintentional admission that the statement is not mere opinion. The Court will therefore deny the motion as to this statement.

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3. Substantially True Statements

Defendant next contends that Plaintiffs cannot sue on the following statements because they are substantially true:

- "Defendant lost money after using Plaintiffs' systems for a whole year."
- "[Plaintiff] said he learned one major thing in 2021 which was not to trade growth stocks in wheel strategy. He never should have used ride as he has stated over and over. Then in late 2021 he traded ARKK. ARKK is a growth ETF. I asked him about this and he has chosen not to respond."
- "Plaintiffs traded ARKK."
- "In [Plaintiffs'] last update video from January 10th, 2022, episode 216, a lot of people expected to see what [Plaintiff] has shown in the past which was his account gains and his unrealized losses. People were expecting to see his 2021 results and he did not share his account at all."
- "When it comes to sharing P&L his strategies are proven not to work in 2021."

Defendant contends, in essence, that the substantial truth of these statements can be established by "admissible facts" evidenced by certain videos. For example, Defendant argues that a reasonable viewer would know how to interpret the statement that Defendant "lost money" using Plaintiffs' systems because the viewer would know that Defendant used a "simulator" and therefore did not use "actual, real money" to test Plaintiffs' systems. Doc. No. 36-1 at 11:9-19. That knowledge on the viewer's part would be based, according to Defendant, on a video in which Defendant makes the following statement:

> I used the software to track my results for a month from January 11, 2021, to February 5, 2021. I traded the three systems separately using twenty-five thousand dollars in each account using paper money.

Id. at 11:10-19.

It is not immediately clear to the Court why a viewer who saw Defendant make this statement would necessarily conclude that Defendant did not use money in testing systems he reviewed. Indeed, it appears to invite—or at least allow for—the opposite conclusion. But in any event, the analysis Defendant asks the Court to undertake as to whether a viewer would know that

he did not test Plaintiffs' program with real money involves factual determinations that the Court cannot properly make on this motion. See Stamas v. Cnty. of Madera, 2010 WL 2556560, at *6 (E.D. Cal. June 21, 2010) ("A Rule 12(b)(6) motion is a challenge to the sufficiency of the pleadings and is not a factual challenge on the underlying merits.").

Defendant's arguments as to the other putatively "true" statements at issue in this motion involve the same type of improper factual analysis. The Court, for example, cannot determine based on the video for which Defendant seeks judicial notice whether "Plaintiffs traded ARKK."[4] The Court will therefore deny this aspect of the motion.

C. Defamation by Implication

The final section of Defendant's motion to dismiss concerns a video that Defendant posted on December 10, 2022 entitled "I Subpoenaed Rockwell Trading's Markus Heitkoetter's Trading Statements" ("Subpoena Video"). Doc. No. 33 ¶ 42. The SAC alleges that this video shows a picture of Defendant and Heitkoetter with the word "BUSTED" across this middle, id., and that Defendant makes statements throughout the video regarding "private discovery information" from this case, including trading statements. Id. ¶ 43.

According to Plaintiffs, the records featured in the Subpoena Video "do not demonstrate the full financial picture or trading record of Plaintiffs for the years discussed," Doc. No. 33 ¶ 44, and the video contains the following statement at the 16-minute mark:

> I might release another video about what really happened with Marcus's 2021 $500,000 Tasty Works public wheel trading account. If you watch Marcus show his monthly results and how he highlighted all his profits and took money out to pay his expenses, you are in for seven shocking secrets about that account. Be sure to subscribe to the channel and hit the notification bell so you don't miss the video.

Id. ¶ 45.

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[4] Defendant seeks judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, of a YouTube video entitled "Trading Options for a Living - $500,000 Trading Account Update #14 (Episode 20)" (available at https://www.youtube.com/watch?v=Bri1RF68sJQ, as of March 15, 2023). Doc. No. 36-3. Defendant offers this video to show that "ARKK clearly appears as a trade that Plaintiffs held while trading their sometimes called 'public account' " and that, consequently, the statement that "Plaintiffs trade ARKK" is true. Doc. No. 36-1 at 12:3-11. The Court cannot take judicial notice of the truth of the contents of online YouTube videos. See Woodall v. Walt Disney Co., 2021 WL 2982305, at *3 (C.D. Cal. Apr. 14, 2021)(citing Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001) and Griffin v. Peele, 2018 WL 5117555, at *3 (C.D. Cal. Jan 18, 2018)). The request is, therefore, DENIED.

Plaintiffs allege that this statement is "designed to further Defendant's false narrative that Plaintiffs are not honest with the results of their trading accounts" and that it "misrepresents data obtained through discovery to demonstrate that Plaintiffs are misleading their customers … regarding the success of Plaintiffs' trading record." Doc. No. 33 ¶ 47. Moreover, they allege that the statement gives "the false impression that Plaintiffs lost money using their own trading method" and "that Plaintiffs' customers frequently lose money because of Plaintiffs' trading methods." Id. ¶ 49.

Defendant contends that Plaintiffs fail to allege that there are defamatory statements in the Subpoena Video. Doc. No. 36-1 at 15:14-19. According to Defendant, Plaintffs "have taken great liberties in 'interpreting' the words published in the [Subpoena] Video to compile a vague summary of accusations against [Defendant], but none with substance." Id. at 15:17-19. Further, Defendant argues that the SAC does not provide sufficient notice for him to defend against claims arising from the Subpoena Video and that, consequently, such claims should be dismissed with leave to amend. Id. at 16:1-9.

To state a claim for defamation by implication under California law, a plaintiff must make allegations showing that "(1) his or her interpretation of [a] statement is reasonable; (2) the implication or implications to be drawn convey defamatory facts, not opinions; (3) the challenged implications are not 'substantially true'; and (4) the identified reasonable implications could also be reasonably deemed defamatory." Issa v. Applegate, 31 Cal.App.5th 689, 707–08 (2019) (quoting Heller v. NBCUniversal, Inc., 2016 WL 6583048, *3-4 (C.D. Cal., June 29, 2016) (some internal quotation marks omitted).

In the Court's view, the "BUSTED" label on Heitkoetter's image combined with Defendant's verbal teasers as to "what really happened with [Heitkoetter'] 2021 $500,000 Tasty Works public wheel trading account" and "seven shocking secrets about [Heitkoetter's] account" invite a reasonable, factual inference that Heitkoetter's investment performance was not as good as he claimed and that he lied about his investment performance in order to promote sales of his flawed investment program. Such an implication is obviously defamatory in that it impugns Heitkoetter's professional competence and truthfulness in business dealings. See Melaleuca, Inc.

v. Clark, 66 Cal.App.4th 1344, 1364 (1998). Defendant has not attempted to establish (and could not realistically establish on this motion) that such implications are truthful. The Court will therefore deny the motion as to Plaintiff's defamation by implication claim.

CONCLUSION

For the foregoing reasons, the motion will be granted as to Plaintiffs' false light claims and denied in all other respects.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's motion to dismiss the Second Amended Complaint (Doc. No. 36) is GRANTED IN PART and DENIED IN PART as follows:
    a. The motion is GRANTED as to the First Cause of Action (false light) and the First Cause of Action is DISMISSED WITH PREJUDICE; and
    b. The motion is DENIED in all other respects.
2. Defendant is ordered to file an ANSWER to the Second Amended Complaint within 21 calendar days of the date of electronic service of this order; and
3. This case is referred back to the magistrate judge for further proceedings consistent with this order.

IT IS SO ORDERED.

Dated: March 16, 2023

SENIOR DISTRICT JUDGE